In the

Supreme Court of the United States

October Term 1976

No. 76-1592

Harvey R. Miller, as Trustee in Bankruptcy of Ira Haupt and Co., a Limited Partnership, Bankrupt,

Petitioner,

v.

New York Produce Exchange *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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May 13, 1977

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Petitioner HARVEY R. MILLER, as Trustee in Bankruptcy of Ira Haupt and Co., a Limited Partnership, Bankrupt, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on February 14, 1977.

Opinion Below

The opinion of the Court of Appeals, not yet officially reported, appears in the Appendix hereto. The District Court for the Southern District of New York rendered no opinion at the conclusion of the trial.[1] Excerpts of the

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[1] The District Court's earlier opinions disposing of various summary judgment motions are reported as *Seligson* v. *New York Produce Exchange*, 378 F. Supp. 1076 (S.D.N.Y. 1974) and 394 F. Supp. 125 (1975).

trial transcript wherein the District Court erroneously directed a partial verdict against Petitioner and relevant portions of its charge to the jury, also assigned as error, are included in the Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on February 14, 1977; this petition for certiorari was filed within 90 days of that date. The Supreme Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Questions Presented

1. Whether, as a matter of law, a federally regulated exchange and the members of its governing board who failed to discharge statutorily imposed regulatory responsibilities are exempt from antitrust liability absent a finding of bad faith.[2]

2. Whether any quantum of alleged wrongdoing will, as a matter of law, bar recovery under a federal statute for damages suffered as a result of failures to discharge statutorily imposed regulatory responsibilities.[3]

[2] If so, then Petitioner intends to raise the following additional question: Whether the trial court erred in refusing to permit the jury to consider the evidence of Respondents' bad faith.

[3] If the Supreme Court answers either question 1 or 2 above in the negative, then Petitioner will also raise the following additional question: Whether, as a matter of law, companies are exempt from liability for the regulatory failures of their employees, despite (a) guaranteeing their acts and paying their dues as members of the Exchange, (b) admitting that their employees represented them on the Exchange Board, and (c) proof that participation of their employees in running the Exchange was an integral part of their employment in the industry.

3. Whether newly promulgated Rule 803(8) of the Federal Rules of Evidence permits an unsigned, undated document from government files, relied upon for the opinions of unidentified experts contained therein, to be admitted into evidence without any supporting testimony whatsoever.

Statutory Provisions Involved

Commodity Exchange Act, In Effect Through November 20, 1963[4]

7 U.S.C. § 5:

> Transactions in commodity involving the sale thereof for future delivery as commonly conducted on boards of trade and known as "futures" are affected with a national public interest; . . . the transactions and prices of commodity on such boards of trade are susceptible to speculation, manipulation, and control, and sudden or unreasonable fluctuations in the prices thereof frequently occur as a result of such speculation, manipulation, or control, which are detrimental to the producer or the consumer and the persons handling commodity and products and byproducts thereof in interstate commerce, and such fluctuations in prices are an obstruction to and a burden upon interstate commerce in commodity and the products and byproducts thereof and render regulation imperative for the protection of such commerce and the national public interest therein.

7 U.S.C. § 7:

> The Secretary of Agriculture is hereby authorized and directed to designate any board of trade as a

[4] Although there have been a number of amendments to the Commodity Exchange Act as it existed in 1963, the basic intent of the Act remains unaltered. Slip Opinion of the Second Circuit below, p. 1778, fn. 1 (hereinafter "Slip Op.").

"contract market" when, and only when, such board of trade complies with and carries out the following conditions and requirements:

* * *

(d) When the governing board thereof provides for the prevention of manipulation of prices and the cornering of any commodity by the dealers or operators upon such board.

The Sherman Act, In Effect Through November 20, 1963

15 U.S.C. § 1:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

The Federal Rules of Evidence, Effective July 1, 1975

Rule 803:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report . . ., or (C) in civil actions and proceedings . . ., factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Statement of the Case

Petitioner, the Trustee in Bankruptcy of Ira Haupt & Co. (the "Trustee"), commenced this action to recover approximately $12,000,000 which Ira Haupt & Co. ("Haupt"), a brokerage concern, lost as a direct result of Respondents' failure to properly discharge their statutory responsibility to fairly and honestly regulate trading of cottonseed oil futures contracts during 1963. Respondents include the New York Produce Exchange ("Produce Exchange"), the commodity market on which such futures contracts were traded, certain members of its governing board (the "Board"), and their companies, which profited directly from Respondents' improper regulation.[5] The first claim for relief alleged a violation of the Commodity Exchange Act of 1936, as amended, 7 U.S.C. § 1 *et seq.*, and the second claim for relief alleged a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Jurisdiction of the District Court was invoked under 28 U.S.C. § 1331 (federal question).

This action arises out of one of the most notorious financial scandals of modern time—the Great Salad Oil Swindle, involving Anthony DeAngelis ("DeAngelis") and his controlled corporation, Allied Crude Vegetable Oil Refining Corp. ("Allied"). Allied, which was in the fats and

[5] The Respondents, in addition to the Produce Exchange, include: Walter C. Klein representing Bunge Corporation ("Bunge"); Harold A. Vogel representing Continental Grain Company ("Continental"); Harry B. Anderson representing Merrill Lynch, Pierce, Fenner & Smith, Incorporated; Sidney Fashena representing I. Usiskin & Company and the President of the Produce Exchange, Donald V. MacDonald.

oil business (JA 1025a-26a),[6] was financially unstable; by 1963 its plight had grown desperate (JA 1046a-47a, 1051a, 1054a, 1061a-63a). To keep Allied afloat, DeAngelis devised various schemes. These included the issuance of false warehouse receipts to secure loans to finance Allied's activities in the cash market (JA 1046a-47a), and the manipulation of futures prices to an artificially high level to prevent, *inter alia,* margin calls which Allied could not meet. In the course of these activities, Allied accumulated an unprecedented 90% of the outstanding long position in cottonseed oil futures contracts (Pl. Exs. 1, 133; JA 813a).

At trial, the Trustee submitted proof that DeAngelis' activities in cottonseed oil futures constituted a manipulation and threatened orderly marketing conditions on the Produce Exchange (*e.g.,* JA 1642a, 2002a-06a): that such activities had the purpose and effect of creating higher prices than warranted by legitimate demand; and that such activities, although totally devoid of business reason, placed in the hands of DeAngelis the power to affect price at will, making the financial stability of the entire market dependent upon him (JA 1985a-86a).

The Trustee next proved that Respondents, both as regulators and traders,[7] had to be aware, through publicly available information, of the highly unusual and

[6] "JA" citations denote references to the trial transcript and exhibits as reproduced in the Joint Appendix submitted by the parties to the Second Circuit. For the Court's convenience, one complete set of said Joint Appendix is transmitted herewith to the Clerk of the Supreme Court.

[7] The individual Respondents or their respective companies were all engaged in buying or selling, as principal or broker, cash and/or futures vegetable oil contracts. Hence none of them was free from the inherent conflict of wearing two hats—one as a regulator and the other as a businessman in the trade being "regulated."

peculiar conditions existing on the Produce Exchange in 1963, including: (a) a doubling of the volume of trading and size of the open interest; (b) extreme concentration of the long and short positions; and (c) extraordinary increases in the number of ex-pit transactions (trades which take place outside the Exchange pursuant to special and limited exceptions to normal trading rules)—from 910 in 1962 to 49,196 in 1963 (*E.g.,* Pl. Exs. 9e, 10c, 10g, 122-126; JA 219a-21a, 271a, 323a, 341a-42a, 365a-70a, 973a, 1691a-92a, 1695a-98a, 2007a-08a).

The Trustee also demonstrated that what should have been readily discernible from public market data was, in any event, known to the Respondents by virtue of their private, profitable business relationships with Allied (Pl. Exs. 140-42; JA 1328a, 1368a-69a, 1447a-48a). From 1960 to 1963, Bunge alone financed DeAngelis to the tune of $400 million; Continental's loans to Allied exceeded $50 million (JA 1328a, 1447a-48).

Further, the Trustee established that as early as May 1963, regulatory action was required to prevent DeAngelis' unlawful activities (JA 1692a). However, Respondents, who were profiting handsomely as a result of the increased market activity (Pl. Exs. 95, 140-42; JA 1032a-33a, 1038a, 1072a-73a, 1137a, 1322a-23a, 1588a, 1594a, 1739a), failed to take appropriate action, even as market conditions grew more and more dangerous (Pl. Exs. 122-26; JA 363a-69a, 1691a-92a, 1695a-98a). Finally, armed with knowledge that DeAngelis held 90% of the open long position (Pl. Ex. 1; JA 813a-15a), Respondents sat back and watched the market collapse while they, as holders of the short position, received millions of dollars (Pl. Ex. 217; JA 441a, 1250a-

52a, 1295a-1308a, 1331a, 1353a-58a). By November 19, Allied had filed for bankruptcy and Haupt (Allied's broker) had run out of funds. At that point, Respondents—knowing that they and others similarly situated would have to pay out their own money to fund any further market declines—closed the market and liquidated the outstanding contracts at artificially low prices fixed by them (JA 460a-61a, 940a-42a).

Based upon this proof, the Trustee contended that Respondents failed to discharge their statutorily imposed regulatory responsibilities and conducted themselves in bad faith and in a fundamentally unfair manner. Such conduct, the Trustee claimed, gave rise to violations of the Commodity Exchange Act and constituted an unreasonable restraint of trade in violation of the Sherman Act.

The District Court concluded that, as a matter of law, Respondents were exempt from liability under the antitrust laws absent a showing of bad faith. Finding insufficient evidence of bad faith, the Court directed a verdict dismissing the Trustee's antitrust claim (JA 1794a [reproduced *infra* at page 13a of the Appendix to this Petition]) without considering whether a standard of reasonableness, fundamental fairness, or indeed, any other standard should apply.

The Commodity Exchange Act claim was submitted to the jury with a direction that any wrongdoing by Haupt which contributed to its loss operated as a total bar to recovery (JA 2115a-16a [reproduced *infra* at page 14a of the Appendix to this Petition]). In giving this instruction, the Court rejected the many cases under the antitrust and

securities laws holding that defenses such as *in pari delicto,* unclean hands, and contributory negligence, must give way to the superior public policy favoring private rights of action as a means of ensuring effective enforcement of federal regulatory schemes.

Additionally, the District Court misconstrued Rule 803(8) of the new Federal Rules of Evidence to permit *per se* introduction of an unsigned, undated document from government files relied upon for the opinions of unidentified experts contained therein, without any supporting testimony or opportunity for cross-examination.

The District Court's determinations were affirmed by the Second Circuit. Viewing bad faith as a necessary element of an antitrust violation by a federally regulated exchange, the Court of Appeals failed to consider any other standard of liability under the Sherman Act. With respect to the Commodity Exchange Act claim, the Second Circuit made its own highly questionable factual findings concerning Haupt's alleged wrongdoing and held that in view of Haupt's status as a member of the Produce Exchange, no possible benefit could flow to the public by permitting the Trustee to recover (Slip Op., p. 1785). Finally, the Court of Appeals summarily dismissed the Trustee's appeal with respect to the improper admission of the unsigned, undated document. Ignoring the fact that this document was used primarily for the opinions of unidentified experts reflected therein, the Court of Appeals held that conclusory statements in an official report did not render it "ipso facto" inadmissible (Slip Op., p. 1786).

REASONS FOR GRANTING THE WRIT

This case presents several important principles with respect to the interplay between federally regulated exchanges, the antitrust laws and the public interest. First, it presents the question left unanswered in *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963)—the standards under which conduct of a federally regulated exchange may be found to violate the antitrust laws. The Trustee submits that if, as held by the Second Circuit, bad faith is the only basis for liability, effective enforcement of the antitrust laws will be severely impaired. Second, this case involves a determination of what conduct will bar a member of a federally regulated exchange from recovery. If, as the Second Circuit held, any impropriety by plaintiff will permit defendants to escape responsibility for their wrongdoing, the public policy of fostering compliance with federal regulatory schemes will be frustrated. Third, this case attempts to resolve the status of a trustee in bankruptcy who seeks to recover against a federally regulated exchange on behalf of innocent creditors of a member firm. Finally, it concerns the proper standards to be applied to the admissibility of evaluative reports under the new Federal Rules of Evidence. On certain of these issues there is little or no prior case law in point; as to others, the decision below conflicts in principle with decisions of other Circuit Courts or of this Court itself.

1.

The Courts Below Improperly Held That, as a Matter of Law, a Federally Regulated Exchange and the Members of Its Governing Board Who Failed to Discharge Statutorily Imposed Regulatory Responsibilities Are Exempt From Antitrust Liability in the Absence of Proof of Bad Faith.

The Courts below held that proof of bad faith was required to establish Respondents' liability under the antitrust laws. The Trustee submits that there was ample evidence from which a jury could have concluded that Respondents acted in bad faith. However, as noted above, to limit antitrust liability to bad faith will seriously impair enforcement of those laws. For this reason alone, the decision below should be reversed.

An Exchange, by definition, is a combination which restrains trade. *Chicago Board of Trade* v. *United States*, 245 U.S. 231 (1918); *McCreery Angus Farm* v. *American Angus Ass'n*, 379 F. Supp. 1008, 1017 (S.D. Ill. 1974), *aff'd*, 506 F.2d 1404 (7th Cir. 1974) ("The mere involvement of an association generally would provide the requisite element of combination or conspiracy.") As such, it enjoys only a limited immunity from the antitrust laws. *Silver* v. *New York Stock Exchange*, *supra*; *Cargill, Inc.* v. *Board of Trade*, 164 F.2d 820 (7th Cir. 1947), *cert. denied*, 333 U.S. 880 (1948). And, as this Court noted in *Silver*, that immunity is narrowly construed to encompass only those restraints of trade found to be essential to carry out the purposes of a co-existing regulatory scheme. 373 U.S. at 357.

Action taken by an exchange in bad faith cannot, by definition, be considered to further the purposes of a regulatory scheme designed, as is the Commodity Exchange Act, to insure fair practice and honest dealings. *See Silver* v. *New York Stock Exchange, supra.* Accordingly, not only does such action lack immunity from the antitrust laws, but bad faith action taken by an exchange would appear to be a *per se* violation of those laws.

Under the holding of the Second Circuit below, where there is no showing of bad faith conduct, the inquiry is at an end. This holding ignores the decisions of this Court and various circuits that, even absent bad faith, exchange action can be found to violate the antitrust laws—if it is taken in a fundamentally unfair manner or otherwise unreasonably restrains trade. *See Chicago Board of Trade* v. *United States, supra,* and the exchange cases which have been decided thereafter, *e.g., Asheville Tobacco Board of Trade, Inc.* v. *FTC,* 263 F.2d 502 (4th Cir. 1959); *Rogers* v. *Douglas Tobacco Board of Trade, Inc.,* 244 F.2d 471 (5th Cir. 1957), *cert. denied,* 361 U.S. 833 (1959). And, in exchange cases, as in other antitrust cases, the question of whether a particular act or course of conduct is a reasonable restraint must be determined by the jury. In addition to motive, the factors to be considered by the jury include the business and economic circumstances surrounding the restraint, the probable impact of the restraint, and whether the restraint will promote the underlying purpose of the antitrust laws and the federal regulatory scheme. The decision below precluded a jury determination of these issues.

In *Silver,* this Court did not reach a conclusion as to the standard to be applied in evaluating whether a particular exchange action unreasonably restrains trade, reserving that question for another day:

> "[T]here is no occasion for us to pass upon the sufficiency of the reasons which the Exchange later assigned for its action. Thus there is also no need for us to define further whether the interposing of a substantive justification in an antitrust suit brought to challenge a particular enforcement of the rules on its merits is to be governed by a standard of arbitrariness, good faith, reasonableness, or some other measure. It will be time enough to deal with that problem if and when the occasion arises." 373 U.S. 365-66.

Petitioner respectfully submits that the occasion for this determination has now arisen; and that the Supreme Court should resolve the issue at this time. The decision below clearly upsets the "balance wheel" of self-regulation. 373 U.S. at 367. If proof of bad faith is the only basis for liability, self-regulated exchanges will effectively be free to ignore concepts of reasonableness and fairness and take actions contrary to the public interest with virtual impunity.

2.

In Conflict With Decisions in Other Circuits, the Courts Below Held That Any Quantum of Wrongdoing Will, as a Matter of Law, Bar Recovery Under a Federal Statute for Damages Suffered as a Result of Failures to Discharge Statutorily Imposed Regulatory Responsibilities.

The Second Circuit treated the Trustee's claim under the Commodity Exchange Act as if it were a simple negligence case of two automobiles colliding at an intersection, and concluded that any degree of wrongdoing on the part of Haupt barred the Trustee from recovery (Slip Op., pp. 1784-85). Ignored were the Trustee's claims of overriding statutory responsibilities and frustration of the policy favoring private rights of action as a means to secure enforcement of a pervasive regulatory scheme established by Congress. In these respects the Second Circuit's decision conflicts in principle with the decisions of this Court and various circuit courts which have rejected defenses based upon the malfeasance or misfeasance of the plaintiff in actions based upon federal "public policy" statutes. *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *Javelin Corp.* v. *Uniroyal, Inc.*, 546 F.2d 276 (9th Cir. 1976); *Calnetics Corp.* v. *Volkswagen of America, Inc.*, 532 F.2d 674 (9th Cir. 1976); *Woolf* v. *S.D. Cohn & Co.*, 515 F.2d 591 (5th Cir. 1975), *rehearing denied*, 521 F.2d 225 (1975), *vacated on other grounds*, 426 U.S. 924 (1976).

The Trustee respectfully submits that the District Court should have instructed the jury to disregard Haupt's alleged misconduct entirely, or at the very least, permitted the jury to balance the relative fault of Haupt and Respondents in light of the latter's overriding regulatory responsibilities.

In *Woolf* v. *S.D. Cohn & Co.*, *supra*, the Fifth Circuit held that even in a case where the fault of the parties was relatively equal, simultaneous and mutual, a plaintiff can recover where the defendant's unlawful activities were of a sort likely to have a substantial impact on the investing public, and the primary legal responsibility for and ability to control that impact lies with the defendant. In *Javelin Corp.* v. *Uniroyal, Inc.*, *supra*, the Ninth Circuit held that, in an antitrust case, only the instigator of an illegal scheme is automatically barred from recovery, and that a recovery even by founding members of a conspiracy is consistent with and supportive of the public interest. 546 F.2d at 279.

The Second Circuit has now taken exactly the opposite approach. In the instant case, the market manipulation by DeAngelis and Allied was in full force for many months prior to the date when Haupt began to serve as broker for DeAngelis (JA 335a-36a, 1875a-76a). Haupt was not represented on the Board of the Produce Exchange, nor was it charged with the statutory responsibility to regulate the market.[8] For the Second Circuit to hold that, no matter how slight, Haupt's alleged wrongdoing constitutes an absolute bar to recovery is a disservice to the Commodity Exchange Act and the policies to be served

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[8] Respondents, not Haupt, had the responsibility to ensure a competitive market free of price manipulation. General Accounting Office, *Report to Congress: Improvement Needed in Regulation of Commodity Futures Trading 4* (1975) ("*GAO Report*").

by private enforcement thereof. *See Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968); *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964).

But further, where, as here, plaintiff is a trustee in bankruptcy, there is even greater reason to reject a defense based upon the alleged improper conduct of the bankrupt. No valid public policy can be served by imputing such conduct to a trustee (especially conduct of an employee claimed to have fraudulently deceived his principals) in order to bar recovery on behalf of innocent creditors. This principle has been enunciated in a series of cases which have held that public policy forbids an exchange from raising such a defense against a trustee or a receiver. *Collins* v. *PBW Stock Exchange, Inc.*, 408 F. Supp. 1344 (E.D. Pa. 1976); *Lank* v. *New York Stock Exchange*, 405 F. Supp. 1031 (S.D.N.Y. 1975);[9] *Pettit* v. *American Stock Exchange*, 217 F. Supp. 21 (S.D.N.Y. 1963).

In its decision below, the Second Circuit assumed that the Trustee sought to step out of the bankrupt's shoes pursuant to the fraudulent transfer section of the Bankruptcy Act, 11 U.S.C. § 110(e), and held that the facts of this case did not support such a claim. But the Trustee never argued that this was a fraudulent transfer case. Nor did he deny that, as a general rule, a trustee stands in the shoes of the bankrupt. What the Trustee contended below, and urges here, is that overriding policy considerations require that the doctrines of *in pari delicto*, unclean hands and contributory negligence should not be used to impute the allegedly improper conduct of Haupt's errant employee to the Trustee in this action so as to bar his suit against the Respondents who failed to perform their statutory duty to properly regulate the Produce Exchange. The Second Circuit did not address this issue directly; this Court should do so.

[9] On January 10, 1977, just prior to its decision herein, the Second Circuit reversed *Lank* and held that neither a member firm, nor its receiver, had a cause of action against an exchange under Section 6 of the Securities Exchange Act of 1934. *Lank* v. *New York Stock Exchange*, 548 F.2d 61. In *Lank*, the Second Circuit confused the issue of whether a cause of action exists in favor of an alleged wrongdoing member of an exchange with whether such exchange member should be barred from recovery because of its alleged misconduct, and, accordingly, failed to grapple with the question of whether public policy favors imputation of negligence to a trustee so as to permit a federally regulated exchange to escape liability for its wrongdoing. This same confusion infected the Second Circuit's decision below. *See* Slip Op. p. 1785, n.4.

3.

In a Case of First Impression, the Courts Below Have Interpreted Newly Promulgated Rule 803(8) of the Federal Rules of Evidence in a Manner Never Contemplated by This Court.

The District Court presented to the jury, as the very first issue for determination, whether there was a manipulation by DeAngelis on the Produce Exchange during 1963.[10] To counter the live and cross-examined expert opinions presented by the Trustee on this threshold question, Respondents relied mainly upon Defendants' Exhibit 1-A, an unsigned, undated document of unknown authorship, emanating from the files of the Commodity Exchange Authority

[10] JA 2133a—2139a. Although special verdict forms were submitted, the jury did not fill them out. It is thus impossible to determine the basis for the jury verdict for defendants.

("CEA").[11]. Although it recites facts and statistics, this document was relied upon by Respondents principally for the opinions and conclusions of unidentified experts contained therein. The principal "Conclusion" is that:

> "[I]t is not reasonable to believe that . . . Allied would attempt to corner the oil markets or attempt to manipulate oil futures prices. . . ."

The District Court ruled that, as a document from the files of the government, Exhibit 1-A automatically qualified for admission under the newly enacted Rule 803(8) of the Federal Rules of Evidence, without regard to any other rules of evidence[12] and without affording the Trustee any

[11] Previously part of the Department of Agriculture, the CEA was severely criticized for its ineffectiveness in the commodity futures trading arena, including its role in the DeAngelis affair (*See GAO Report*), and in 1975 was replaced by an independent regulatory body, the Commodity Futures Trading Commission. Pub. L. 93-463 (1974).

[12] At most, given appropriate circumstances not present here, the official nature of a record can overcome the hearsay objection to admissibility. The document remains subject to the full panoply of other evidentiary rules, and only when the document complies with those rules may it be admitted into evidence. *Atlantic Mut. Ins. Co.* v. *Lavino Shipping Co.*, 441 F. 2d 473, 475 (3d Cir. 1971); *United States* v. *Verville*, 355 F.2d 527, 530 n.5 (7th Cir. 1965); *Matthews* v. *United States*, 217 F.2d 409 (5th Cir. 1954).

Thus, Rule 803(8) does not change the requirement that to be admissible, a document must concern matters to which its author could testify if he were called to the witness stand. *Olender* v. *United States*, 210 F.2d 795, 801 (9th Cir. 1954). Here no foundation was laid for Exhibit 1-A with respect to the requirement of first-hand knowledge. The document itself does not reflect the source of its factual statements, opinions and conclusions, and Respondents offered no independent evidence with respect thereto.

Nor does Rule 803(8) overrule the requirement of Rule 702 of the Federal Rules of Evidence that a person presenting expert opinions must be qualified to do so. Neither Exhibit 1-A nor Respondents established that the author or authors of the document, if called to testify in person, would have been qualified to give the

opportunity for *voir dire* or cross-examination. By virtue of the Court's rulings, the Trustee could not examine into, among other things, the qualifications and expertise of the author(s); his (their) knowledge; his (their) bias and motivation; the reasons why the document was amended, at least once, on such a critical issue as the bona fides of Allied's ex-pit trades; the reasons why the circulation of the report was severely limited, and the report itself apparently never made "public"; the reasons why the so-called attestation nowhere states whether this was a "final" report; the reasons why the report was not located during early stages of discovery in this case; and all the other strange circumstances surrounding the preparation of this "report".

The prejudice to the Trustee was blatant. Exhibit 1-A was not introduced by Respondents for the purported "facts" which it contained; it was introduced for its "Conclusion." The "Conclusion" was read to the jury (JA 1972a-1976a); referred to by Respondents time and again in their summation to the jury (JA 2099a-2100a, 2101a, 2102a-03a, 2104a, 2106a-07a); and, indeed, the jury itself called for this Exhibit during its deliberations (Ct. Ex. 2; JA 2123a).

The District Court clearly misconstrued the purport of Rule 803(8) and assumed that any document indicated as having emanated from the files of a government agency was entitled, without more, to be admitted as an "official record". Surely Rule 803(8) was not designed to substitute trial by report for trial by jury, depriving a party of his fundamen-

expert opinions contained therein. *Franklin* v. *Skelly Oil Co.*, 141 F.2d 568 (10th Cir. 1944); *see Colvin* v. *United States*, 479 F.2d 998 (9th Cir. 1973); *Standard Oil Co.* v. *Moore* 251 F.2d 188 (9th Cir. 1957), *cert. denied*, 356 U.S. 975 (1958).

tal right to cross-examine hostile witnesses and have the jury adjudge their credibility.[13] The legislative history shows, to the contrary, that the Rule was designed to permit admission of reports reflecting either routine administrative activity whose trustworthiness, by its very nature, ought not be susceptible to challenge, or administrative findings made after hearing, with notice to all interested parties. H.R. Rep. No. 93-650, 93d Cong., 1st Sess. 14 (1973); S. Rep. No. 93-1217, 93d Cong., 2d Sess. 18 (1974); Advisory Committee's Note, 4 Weinstein, Evidence 803-45 (1975). Such reports bear no resemblance to Exhibit 1-A, prepared without notice or hearing in the wake of an unprecedented market debacle by an agency which was criticized for its role therein,[14] and which contained expert opinion on complex and controverted matters requiring substantial testimony by experts at trial. The circumstances surrounding this document hardly furnish the trustworthiness contemplated for application of Rule 803(8).

[13] As Professor Wigmore has stated, cross-examination "is beyond any doubt the greatest legal engine ever invented for the discovery of truth." 3 Wigmore, Evidence § 1367 (3d ed. 1940).

[14] Exhibit 1-A was an after-the-fact, self-justification prepared in the wake of severe Congressional criticism of the CEA's inept handling of the DeAngelis affair. *See, e.g.*, GAO Report. The CEA and its activities with respect to the matters covered in the report were also criticized by the Office of the Inspector General of the Department of Agriculture (Department of Agriculture, Office of the Inspector General, Audit Report—Commodity Exchange Authority (1965) (Def. Ex. 211 id). Exhibit 1-A was not published; instead it was circulated in a tightly controlled manner to no more than fourteen government employees and may well have been suppressed during the Trustee's discovery proceedings (JA 1917a). Furthermore, the Exhibit was amended, without explanation, on an aspect essential to this case—the legitimacy of Allied's ex-pit transactions (Def. Ex. 1-A [Transmittal Memorandum]; JA 975e).

We submit that this Court, in promulgating Rule 803(8), never intended that purported expert opinions could be presented to a jury merely by waving before it a sheet of paper reflecting naked conclusions written by an unknown author, of unknown credentials, in unknown circumstances. If the decision below is allowed to stand, the fundamental right of cross-examination in federal jury trials will be seriously impaired.

Conclusion

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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APPENDIX

Opinion of the Second Circuit

Van Graafeiland, *Circuit Judge:*

On April 11, 1966, plaintiff's predecessor as Trustee commenced the above entitled action to recover approximately $12 million which, he alleged, the bankrupt, Ira Haupt & Co., had lost through the fault of the defendants. Nine years later, after extensive pretrial discovery and a massive accumulation of papers, documents, transcripts and

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records from this and other proceedings, the case went to trial before Judge Carter and a jury. Following a six-week trial, verdicts were directed in favor of several of the named defendants, and the jury thereafter found for those who remained. Review of the exhaustive record and exhausting briefs discloses no error, and the judgments are affirmed.

This litigation is an off-shoot of one of the most notorious financial scandals of our time, in which some 1.6 billion pounds of salad oil mysteriously disappeared from storage tanks and losses in excess of $200 million were sustained by investors and financial institutions. *See American Express Warehousing, Ltd.* v. *Transamerica Insurance Co.,* 380 F.2d 277 (2d Cir. 1967); *People* v. *Bunge Corp.,* 25 N.Y. 2d 91, 96 (1969); *Procter & Gamble Distributing Co.* v. *Lawrence American Field Warehousing Corp.,* 22 App. Div. 2d 420, 425 (1st Dept.), rev'd 16 N.Y. 2d 344 (1965).

Among those who suffered most grievously in this debacle was Ira Haupt & Co. which was forced into bank-

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* References are to the Slip Opinion pagination.

ruptcy. *See In re Ira Haupt & Co.*, 234 F.Supp. 167 (S.D.N.Y. 1964), *aff'd*, 343 F.2d 726 (2d Cir.), *cert. denied*, 382 U.S. 890 (1965) & 348 F.2d 907 (2d Cir. 1965). As so often happens in situations of this nature, the victim is forced to seek financial solace from other than the fraudulent miscreant; the target in this case being the New York Produce Exchange and a number of its directors.

The miscreant who magically transformed oil into water was Anthony De Angelis, and the corporate vehicle through which he performed this legerdemain was Allied Crude Vegetable Oil Refining Corp. (Allied). Allied did much of its trading on the New York Produce Exchange (the Exchange); and, in the Spring of 1963, Haupt, a member of the Exchange, became Allied's broker. The events which followed upon this unhappy association are set forth in

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detail in the opinion of Judge Carter on defendants' summary judgment motion, reported at 378 F. Supp. 1076-1109, and need not again be recounted at length. Briefly, however, it appears that Allied attempted to hide its vulnerable position by creating a seller's market through rising prices. To accomplish this, it invested heavily in cottonseed oil futures. By November 1963, it was the buyer in approximately 90% of the future oil contracts on the Exchange, and Haupt was the broker on 80% of these contracts. As the price of oil climbed, Haupt's financial position was rosy. Gains and losses on futures contracts were calculated daily by the New York Produce Exchange Clearing Association, and variation margin payments were paid or received by the Association accordingly. Haupt therefore received daily payments of variation margin from the Association which in turn were collected by it from those who

had sold short. However, when Allied began its financial collapse on November 14, 1963, the futures market turned about; and Haupt was then required to pay variation margin for the benefit of the short sellers. During the next five days, until the exchange was closed on November 19, Haupt paid the $12 million which its Trustee in bankruptcy seeks to recover in this suit.

Congress has recognized that excessive speculation and manipulation in commodity transactions obstruct and burden interstate commerce and has enacted preventive legislation known as the Commodity Exchange Act, 7 U.S.C. § 1, *et seq.* Under this Act,[1] the Secretary of Agriculture was authorized to designate boards of trade as "contract mar-

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kets", and the markets, of which the Exchange was one, were required to provide for the prevention of manipulation of prices and the cornering of any commodity by dealers or operators. 7 U.S.C. § 7; *Case & Co. v. The Board of Trade of the City of Chicago*, 523 F.2d 355, 362 (7th Cir. 1975). The Act also made it unlawful for any person to manipulate or attempt to manipulate the price of any commodity or to corner or attempt to corner any commodity. 7 U.S.C. § 13.

Plaintiff's allegation of wrongdoing on the part of the defendants is that they allowed Allied to gain an inordinately dominant long position in the futures market and

[1] References herein to the Commodity Exchange Act are to the Act as it existed in 1963. Although the basic intent of the Act remains unaltered, there have been a number of amendments, including one which created the Commodity Futures Trading Commission and transferred authority from the Secretary of Agriculture and the Commodity Exchange Authority to the new Commission. See Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389.

then failed to immediately close the market on November 14, 1963 when this position was discovered. Defendants contend, on the other hand, that, prior to November 14, they did not know, and had no way of knowing, what Allied was up to but that Haupt, who was the broker on most of Allied's deals, did. Defendants also contend that their actions subsequent to November 14 were intended only to prevent panic and to attempt to maintain an orderly market. The principal matter in dispute between the parties on appeal involves the correctness of the District Court's rulings and charge concerning the respective duties of Haupt and the defendants.

The Duties of the Exchange

Plaintiff based his claim against the defendants upon alleged violations of both the Commodity Exchange Act and the Sherman Act, 15 U.S.C. § 1 *et seq.* It was his contention that the officers of the Exchange acted both negligently and in bad faith and that therefore the activities of the Exchange were in violation of both acts. The District Court found, however, that there was no evidence to support plaintiff's claim of bad faith and dismissed those portions of the complaint which relied upon such proof.

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In submitting the case to the jury, the District Judge instructed it that there were two separate time periods which it must consider in evaluating plaintiff's claims—one from the Spring of 1963 to November 14, and the other from November 14 to November 19, the date on which the Exchange was closed. With regard to the first period, he charged that the Exchange had the initial responsibility for maintaining orderly market conditions and that its

directors "must act with the utmost objectivity, impartiality, honesty, and good faith, and they must exercise reasonable diligence in observing and making themselves aware of market conditions in order to carry out their regulatory responsibilities." He charged further, that, if Allied was manipulating or distorting the orderly function of the market during this time and if the defendants "knew or should have had reason to believe or suspect that a manipulation was in progress, or that disruptive forces were at work which would lead to a disorderly market", the directors were required to take appropriate remedial action.

With regard to the second period, it was plaintiff's contention, as outlined by the District Judge, that defendants were negligent in waiting until November 19 to close the market instead of doing so on November 14. The Judge charged that a director has broad discretion in making business judgment; that he could be held liable only if his conduct deviated from that of reasonable men in similar positions and circumstances and he failed to reasonably carry out his duties and abused his discretion in regulating the market.

After carefully reviewing the record, we agree with the District Judge that it is entirely devoid of any evidence of bad faith on the part of the defendants. The Exchange was a non-profit corporation whose directors served without compensation, and none of them stood to gain in any

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way by permitting Allied to corner the oil market. There is no proof that any of them had actual knowledge of Allied's allegedly unlawful activities. The positions of all traders on the Exchange were kept secret from all other

traders and from the Exchange itself, and plaintiff's proof was of the "should have suspected" variety based on indicia pointed to twelve years after the event by plaintiff's expert witnesses. The Commodity Exchange Authority of the Department of Agriculture (CEA), which did know the exact position of every trader on the Exchange because this information was required to be filed with it, did not detect any of the wrongdoing which plaintiff contends defendants should have known without the benefit of the same information. The evidence as to defendants' alleged negligence may have been sufficient to make a jury question. There was nothing, however, which would have supported a finding of bad faith.

Proof is also completely lacking that defendants had any ulterior motives in failing to immediately close the market on November 14 when they first learned from the CEA of Allied's large position in futures. When Haupt heard on the same day that Allied was having financial difficulties, it made no effort to notify the Exchange. Moreover, it made no request that the Exchange be closed, until Allied filed for bankruptcy on November 19. Instead, Haupt increased its own position in the market by some 2,510 contracts. During the five-day period between November 14 and November 19, the Exchange was exploring the possibility of arranging for other traders to take over some of Allied's future position; and it did this with the blessing of the CEA. This was in keeping with the "broad and flexible powers" granted the Exchange to enable it to insure an orderly market. *Case & Co. v. The Board of Trade of the City of Chicago, supra*, 523 F.2d at

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362. Again, none of the defendants could look forward to any personal gain from keeping the market open.

Where the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, reasonable men can reach only one conclusion, it is insufficient for the jury. *See Simblest* v. *Maynard*, 427 F.2d 1, 4 (2d Cir. 1970). "A fraudulent conspiracy may be shown by circumstantial evidence, but the facts and circumstances relied upon must attain the dignity of substantial evidence and not be such as merely to create a suspicion." *Johnson* v. *J. H. Yost Lumber Co.*, 117 F.2d 53, 61 (8th Cir. 1941). Suspicion, conjecture and speculation are not enough. *Venzie Corp.* v. *United States Mineral Products Co.*, 382 F. Supp. 939, 950-51 (E.D.Pa. 1974), *aff'd*, 521 F.2d 1309 (3d Cir. 1975); *Business Development Corp.* v. *United States*, 428 F.2d 451, 453 (4th Cir.), *cert. denied*, 400 U.S. 957 (1970); *Independent Iron Works, Inc.* v. *United States Steel Corp.*, 177 F.Supp. 743, 746 (N.D. Cal. 1959), *aff'd*, 322 F.2d 656 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963). The purported fact issue must be actual rather than theoretical, real rather than imaginary. *Meeker* v. *Rizley*, 346 F.2d 521, 525 (10th Cir. 1965); it requires more than a "scintilla or modicum of conflicting evidence". *A. B. Small Co.* v. *Lamborn & Co.*, 267 U.S. 248, 254 (1925). There is not a scintilla of evidence in this case that any of the defendants was guilty of bad faith.

Defendant directors, relying on securities fraud cases such as *Lanza* v. *Drexel & Co.*, 479 F.2d 1277 (2d Cir. 1973), contend that, without a showing of bad faith or scienter, there can be no liability on their part for failure to control manipulation. Although the District Court did make plaintiff's burden of proof much easier by holding defendants to the more rigorous negligence standard, the jury's finding in defendants' favor makes it unnecessary

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for us to consider defendants' argument that their duties were less onerous than as described by the District Court.

In sum, we find that plaintiff has no cause to complain concerning the standards which the District Court applied in prescribing the duties of the defendants, and we are satisfied that the jury verdict was fully supported by the evidence.

The Duties of Haupt

Although the proof is clear that Haupt played a dominant and knowing role in whatever market manipulation was established, appellant, as its Trustee in bankruptcy, seeks to disassociate himself from any wrongdoing on Haupt's part. To do this, appellant now attempts to bring his claim within the coverage of § 70(e) of the Bankruptcy Act, 11 U.S.C. § 110(e) as if he were suing on behalf of the bankrupt's creditors to set aside a fraudulent transfer of corporate assets. *Cf. Schneider* v. *O'Neal,* 243 F.2d 914 (8th Cir. 1957).

However, the variation margin payments upon which plaintiff's claim is based were not made to the defendants herein, but to the Clearing Association, a separate and distinct corporate entity which is not a party defendant. Plaintiff's suit, nominally and in actuality, is for "damages". This being the case, plaintiff stands in the bankrupt's shoes and is subject to all claims and defenses which might have been asserted against the bankrupt. *Bank of Marin* v. *England,* 385 U.S. 99, 101 (1966); 4A Collier, Bankruptcy § 70.28, at 385.

Section 9 of the Commodity Exchange Act, 7 U.S.C. § 13, made it unlawful for any person to "manipulate or attempt to manipulate the price of any commodity . . . for future delivery on or subject to the rules of any board of trade" or to "corner or attempt to corner any such commod-

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ity. . . ." This proscription was binding upon Haupt as a member of the Exchange and a registered future commissions merchant. *Volkart Bros., Inc.* v. *Freeman,* 311 F.2d 52 (5th Cir. 1962);[3] *Great Western Food Distributors, Inc.* v. *Brannan,* 201 F.2d 476, 484 (7th Cir.), *cert. denied,* 345 U.S. 997 (1953). In addition, Haupt, as a member of the Exchange, was bound to abide by its rules which prohibited manipulative activity. Manipulations "exert a vicious influence and produce abnormal and disturbing temporary fluctuations of prices that are not responsive to actual supply and demand and discourage not only . . . justifiable hedging but disturb the normal flow of actual consignments." *Board of Trade of The City of Chicago* v. *Olsen,* 262 U.S. 1, 39 (1923).

The District Court instructed the jury that Haupt owed a duty to act with reasonable care in maintaining the integrity of the market and that, if its own acts or omissions were a proximate cause of its injuries, it could not recover. Measuring this charge by whether it best promotes the objectives of the Commodity Exchange Act which are to protect commerce and the national public interest therein. 7 U.S.C. § 5; *cf. Globus* v. *Law Research Service, Inc.,* 418 F.2d 1276, 1287-89 (2d Cir. 1969), *cert. denied,* 397 U.S. 913 (1970); *Kuehnert* v. *Texstar Corp.,* 412 F.2d 700, 704 (5th Cir. 1969); *Herzfeld* v. *Laventhol, Krekstein, Horwath & Horwath,* 378 F.Supp. 112, 132-138 (S.D.N.Y. 1974), *aff'd*

[3] *Volkart* contains an excellent description of the operation of a commodity futures exchange.

in part and rev'd in part, 540 F.2d 27 (2d Cir. 1976), we think it was eminently correct.

Appellant contends that wrongdoing on the part of Haupt should not prevent recovery herein, because this would not be in the public interest.[3] We do not agree. Al-

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though the regulatory provisions of the Act apply to both traders and exchanges, the ultimate aim and intent of the Act is the elimination of wrongful conduct on the part of the traders. It is they, not the exchanges, who manipulate commodity markets. Moreover, in view of the pattern of secrecy which surrounds the activities of traders, it is they, rather than the unknowing directors of exchanges, who best can determine whether the salutary objectives of the Act are to be achieved. Errant plaintiffs have sometimes been permitted recovery in the public interest in order to discourage greater wrongdoing by the defendant. *Cf. Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968). However, where a defendant's only sin is its failure to prevent transgressions by the plaintiff, no benefit flows to the public from rewarding the transgressor. *Cf. SEC* v. *Packer, Wilbur & Co.*, 498 F.2d 978, 985 (2d Cir. 1974). We are not yet prepared to hold that it is in the public interest that any plaintiff should be permitted recovery "lest the supposed wrongdoer be allowed to escape a reck-

[3] Although it is not dispositive of the issues before us, we note that in *In re Ira Haupt & Co., supra,* 234 F. Supp. at 169, the court said:

> Since nearly all the public customers have been paid out, what remains to be done with respect to the Haupt affairs no longer affects the public interest at large. . . . (Footnote omitted).

oning." *Bangor Punta Operations, Inc.* v. *Bangor & Aroostook R.R.*, 417 U.S. 703, 717 (1974).[4]

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Appellant's Remaining Contentions

Appellant makes other assertions of error, only a few of which merit comment.

The directors of the Exchange were elected by the entire membership and served without pay. Each was employed full time in other occupations, and appellant named their employers as parties-defendant. The District Judge dismissed the complaint as to these corporate employers because he found nothing in the record to establish that, as members of the Board, the individual defendants were acting in any manner on behalf of their employers. We agree. In any event, because the corporate defendants' liability

[4] Appellant placed great reliance upon *Lank* v *New York Stock Exchange,* 405 F.Supp. 1031, 1036-37 (S.D.N.Y. 1975), which held that the receiver of a defunct securities brokerage firm could sue the Exchange under § 6 of the Securities Exchange Act, 15 U.S.C. § 78f, despite the fact that the brokerage firm's own wrongdoing contributed substantially to its losses. On January 20, 1977, subsequent to briefing and argument herein, we reversed *Lank,* stating:

> Thus we conclude that it was the intention of Congress to draw a clear line of demarcation between public investors, on the one hand, who may assert claims against a stock exchange for damages arising out of violations of Section 6, and, on the other hand, members of those exchanges, who may not. The Congress did not enact Section 6 for the purpose of affording protection to the very members of the stock exchanges whose conduct was being regulated at the expense of those exchanges. We therefore hold that a securities exchange is not liable to a member organization for failure to force the member to comply with the exchange's rules. *Lank* v *The New York Stock Exchange,* Dkt. No. 76-7243 (2d Cir. Jan. 20, 1977), slip opin. 1497, 1508.

Although we are considering a different statute, we find that the above reasoning may be applied appropriately to the claim being made herein.

could only be derivative, the jury verdict in favor of their alleged agents makes the issue moot.

The District Court admitted into evidence an official document of the CEA containing the data which the Authority had in its files concerning cottonseed oil purchases and sales in 1963, which also contained some statements concerning prices and a commodity squeeze which appellant contends were conclusory. We find no error in this admission. It is often difficult to distinguish between what is fact and what is opinion. *See* 4 Weinstein's Evidence § 803(8)[03] at 185 (1976). For example, the existence or non-existence of a squeeze is demonstrated by a factual compilation of figures. In any event, conclusory statements in an official or business report do not render it ipso facto inadmissible. ***See, e.g., Smith* v. *Universal Services, Inc.*,**

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454 F.2d 154, 158 n.2 (5th Cir. 1972); ***McCarty* v. *United States*,** 185 F.2d 520, 522 (5th Cir. 1950); ***Moran* v *Pittsburgh-Des Moines Steel Co.*,** 183 F.2d 467, 472-73 (3d Cir. 1950). The admission of this evidence was within the broad discretion of the District Court. ***United States* v. *Miller*,** 500 F.2d 751, 754 (5th Cir. 1974), *rev'd on other grounds*, 425 U.S. 435 (1976); ***United States* v. *Covello*,** 410 F.2d 536, 543 (2d Cir.), *cert. denied*, 396 U.S. 879 (1969).

Other evidentiary rulings complained of were also made in the exercise of the District Court's discretion; and, absent any showing of abuse, its determination is controlling on review. *See United States* v. *Bowe*, 360 F.2d 1, 15 (2d Cir.), *cert. denied*, 385 U.S. 961 (1966); ***Olsen* v. *Realty Hotel Corp.*,** 210 F.2d 785, 786-87 (2d Cir. 1954).

The judgment appealed from is affirmed.

The District Court's Directed Verdict on Petitioner's Antitrust Claim

[1794a]*

The Court: . . . I don't believe that there is on this record sufficient evidence for me to send to the jury the plaintiff's contentions as to Count 2, I'm clear on that.

There is no evidence of any combination or conspiracy, no evidence I can recall in this record; and there is no evidence that constitutes bad faith that I can recall on the record or that any reasonable person—I think that is the state of the—could conclude from that.

So Count 2 is dismissed.

* Reference is to the Joint Appendix pagination.

The District Court's Charge to the Jury on Proximate Cause

The Court: . . .

[2115a]*

Now, it is the contention of the defendants in this case that Haupt's own conduct during the period in question was the cause of any injury it claims it has suffered.

* * *

"[I]f you find that any acts or omissions on the part

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of Ira Haupt and Company, or of Haupt's officers or employees, acting within the scope of their employment, were a proximate cause of Haupt's injuries, then you must find in favor of the defendants. Now, recall that I have already explained to you the meaning of proximate cause.

Let me emphasize that in order for defendants to prevail on the basis of Haupt's own misconduct, defendants bear the burden of convincing you, by a fair preponderance of the evidence, that Haupt's own acts or omissions were a proximate cause of its injury.

Therefore, if you have found that plaintiff's injury was proximately caused by a defendant's acts or failure to act during the period prior to November 14, or during the period November 14th to 19th, or both, and you find that plaintiff's own conduct during any part of the time span involved was also a proximate cause of plaintiff's injury, you must find for the defendant. Plaintiff can succeed only if the defendant's action or inaction was a proximate cause of plaintiff's injury, and plaintiff's own action or inaction was not.

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* References are to the Joint Appendix pagination.